IN THE

SUPREME COURT OF THE UNITED STATES

No. [redacted]

Term, 196[illegible]

EUGENE DONALD METZ — Petitioner

versus

UNITED STATES OF AMERICA — Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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WESTERFIELD PRINTING CO., INCORPORATED, LOUISVILLE

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EUGENE DONALD METZ, - - - - *Petitioner,*

v.

UNITED STATES OF AMERICA, - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner, Eugene Donald Metz, respectfully prays that this honorable Court cause a Writ of Certiorari to be issued to review the final Orders and Judment of the United States Court of Appeals, for the Sixth Circuit, which judgment was entered on April 30, 1963.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 312 Fed. 2d 199.

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit was made and entered on January 22, 1963, and an Order overruling petitioner's motion for a rehearing *en banc* was entered on April

30, 1963. Copies of both are appended to the petition and appear in the Appendix at page 12. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED.

Your petitioner was convicted of conspiracy to violate the Mann Act and violation of said Act. The only witness against the petitioner who testified as to the alleged transportation across a state line was a 15 year old girl who, instead of accusing the defendant of the offense charged, denied that defendant was guilty as charged in the indictment.

With no showing of hostility, the trial Court permitted the district attorney to cross-examine this witness. The basis of the cross-examination was a written statement purportedly given by the witness to an F.B.I. agent, without counsel for the defendant being given an opportunity to see the statement prior to cross-examination. The questions involved are: (1) Can the government impeach its own witness by statements allegedly made to a third person at variance with her testimony, when the witness denies the truthfulness of such previous statements and can the government rest its case without offering the statement or the witness to whom said previous statements had been made, or, in substance, can contradictions be considered substantive proof?

(2) Article VI of the Constitution of the United States guarantees to any person the right to be confronted by the witnesses that accuse them. It is the

contention of the petitioner that the right of confrontation is no more important than the right to have the witness accuse, and in this instance the witness confronted the petitioner but did not accuse him. The question here involved is the denial of the constitutional right of this defendant to be accused by the witness that confronts him and not have that accusation merely contained in questions asked by the district attorney but denied by the witness.

(3) Whether the court erred in failing to instruct the jury that in order to convict the defendant, the unlawful purpose of which he is accused must have been his immoral purpose and not merely that of the female involved.

CONSTITUTIONAL PROVISIONS INVOLVED.

United States Constitution, Article VI, which is set forth in the Appendix at page 11.

Petitioner submits that the above section of the Constitution provides plainly and explicitly that not only must the witness confront a defendant, but such witness must accuse him, and this means that the accusation must be based on the voluntary statements and not on contradictions suggested by questions of the attorney, with no proof that such contradictory statements ever were made.

STATEMENTS

The petitioner and Kenneth Eugene Miller were indicted and convicted of the offense of conspiring unlawfully to transport a female in interstate commerce for immoral purposes (18 USC, Section 371 and 2421). Each received a five year sentence. Petitioner was also convicted of the offense of unlawfully transporting a female in interstate commerce (18 USC, Section 2421). For this he received an additional five year sentence.

The only witness for the government who could have testified to facts making out the charge was the witness Mae Deloris Garland and instead of accusing this petitioner in her direct testimony, she not only did not accuse but, in every instance, absolved this petitioner of any violation as charged. In fact, in the certified record, pages 11A through 14A, her testimony completely proves the innocence of this petitioner. At this point the district attorney asked the Court for permission to consider the witness a hostile witness and to be allowed to cross-examine her. Without any proof of hostility and over the objection of defense counsel, the court granted such permission. Moreover, the trial judge refused counsel for petitioner the right to see the statement on which such cross-examination was based until the government had completed its cross-examination.

The district attorney then asked the following questions as if they were contained in the statement pre-

viously given to F.B.I. Agent Barry, and each question was denied or, at least, not admitted:

(a) "Gene (defendant Metz) made a telephone call to Chicago, which he told me was to a friend of his to make arrangements for me in Chicago." Witness Garland denied that she had said this (A. 21a).

(b) "After he called this person, he told me that the arrangements were all made." The witness did not admit making this statement (A. 22a).

(c) "That before Gene (Metz) left he said that Blackie would tell me what to do and just to go along with him." Witness denied it had happened "exactly like that", stated that Metz had simply said that Blackie would help her but that Metz would have to ask him to do so, and did not admit making the statement attributed to her (A. 23a).

(d) "That defendant Metz had been present at the time that Miller told witness that she had better go back to Newport to avoid trouble for him, and that she should say, if asked, that she had come to Chicago by bus. The witness denied that she had said this, and stated that Metz had already left Chicago at the time of this conversation (A. 28a, 29a).

(e) "That defendant Metz had talked to witness on the way to Chicago about her engaging in prostitution. The witness flatly denied that she had said any such thing to Barry (A. 33a)."

The prosecution, after the above questions had been asked and denied, then suggested to the witness that the defendants' attorney had talked to her and the

suggestion that someone had advised her not to tell the truth here in Court and then, in the finest form of a Perry Mason television Court room trial, he clinches his point, for which he has no proof, by saying: "You are sure of that" and again the witness insists that she is "positive."

That a conviction cannot rest on mere impeachment of a witness is fundamental in any idea of a fair trial. For a witness to exonerate an accused and then by inference and innuendo to be proved a liar, is not proof of a defendant's guilt. See Eisenberg v. United States, 5th Circuit, 1959, 273 Fed. 2d 127-130.

In a civil case where the same tactics were used, the Court had this to say:

> "By contradicting the witness in this fashion, the plaintiff got into the record and before the jury matter which was not evidence at all. Its admission, we are constrained to find, was error." Philadelphia & R. Railway Company v. Bartsch, 3rd Circuit, 1925, 97 F. 2d 858, 861.

The United States Court of Appeals for the Sixth Circuit summarily disposed of the contentions raised above, both in the original opinion and in the order overruling the petition for rehearing.

REASONS FOR GRANTING WRIT.

The Supreme Court of the United States has a long and enviable record of protecting the rights of defendants in criminal cases. A "shuffling Sam" in a bus station, accused of loitering, finds a friendly hearing in this Court. If the practice engaged in in this case should become the precedent for future trials, no defendant could ever feel that he would receive a fair trial in a federal Court. Your petitioner herein is arbitrarily denied the right of being confronted by a witness that accuses him. It is not enough to confront a defendant with a witness and then to contend that when the witness does not accuse him in open court, to prove the case by showing that the witness accused the defendant at a former time in a statement, which is not offered in evidence and is not supported by proof.

For the following reasons the Court should grant this petition:

(1) Every defendant has the right under Article VI of the Constitution of the United States not only to be confronted but accused. In this case a reading of the record, which is brief, shows these undisputed facts:

(a) The witness, Mae Deloris Garland, was the chief government witness and the only one connecting this defendant with the offense charged.

(b) The witness, Mae Deloris Garland, did not accuse the defendant, but rather absolved him from blame and the only accusation is contained

in the questions asked by the District Attorney in a Perry Mason fashion and then not supported by the person to whom the contradictory statements are supposed to have been made.

(c) In fact, the witness, Mae Deloris Garland, on direct examination, proved the petitioner innocent of the crime charged.

(d) With no showing of hostility, the trial judge permitted the district attorney to cross-examine and impeach his own witness by innuendo contained in questions and then not supported by any testimony as to the truth of said contradictions.

(e) The trial Court refused petitioner a copy of the statement on which the cross-examination was made until after the government had questioned the witness.

That the conviction in this case is based upon the district attorney's questions, which contain statements upon which guilt could be based, is undeniable. There is no direct testimony of the witness. The statement containing the contradictions should have been given to the defendant prior to the government's cross-examination.

See Morris v. United States (CCA 5th), 149 Fed. 123, 14 American Jurisprudence, Criminal Law, Section 182, page 893; Green v. McElroy, 360 U. S. 474, 79 Supreme Court 1400, 3 L. Ed. 2d 1377.

The constitutional right of confrontation is an historical one, being based on common law principles. It is present in our Federal Bill of Rights and is also present in many state constitutions and statutes. The

primary object of confrontation is to compel the accuser to meet face to face with the defendant and to permit free, complete and uninhibited cross-examination. Its secondary object is to permit the jury to observe the demeanor of both parties, especially the witness.

Kirby v. U. S., 174 U. S. 47, 19 S. Ct. 574, 43 L. Ed. 890;

Mattox v. U. S., 156 U. S. 237, 15 S. Ct. 337, 39 L. Ed. 409.

To permit a government witness to testify from a paper, or statement, without first permitting the defendant to see said document, depriyes the defendant the full and unfettered right to be confronted with the witness against him and also deprives him of the full right to defend himself. Morris v. United States, *supra*.

In the present case, it requires no stretch of the mind to see that it was the *statement* of the witness that was the basis of the jury's verdict. The statement was, in effect, the only government witness. Its introduction into the case was improper, due to a lack of showing of hostility. Then, the trial Court refused to permit counsel for petitioner to see it, prior to the government's impeachment. The entire transcript shows that the witness testified reluctantly, under force, coercion and duress. The government *made her say what was in that written statement*. A confrontation of an accuser, under such circumstances, certainly does not comply with the letter, or spirit, of the Sixth

Amendment. A witness for the government, especially in a criminal case, should be permitted to testify, under oath, freely and fully. For this Court to permit such tactics is to do violence to all principles of justice.

(2) The petitioner sought and was refused an instruction to the effect that a Mann Act defendant has a right to have a jury instructed that the unlawful purpose must be his, not merely his passenger's, in order to justify a conviction. The failure to give this instruction was reversible error. See Mafaga v. United States, 57 Fed. 2d 822.

CONCLUSION.

For the reasons above set out, we respectfully submit that this petition for Writ of Certiorari should be granted.

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